TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 757

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

vs.

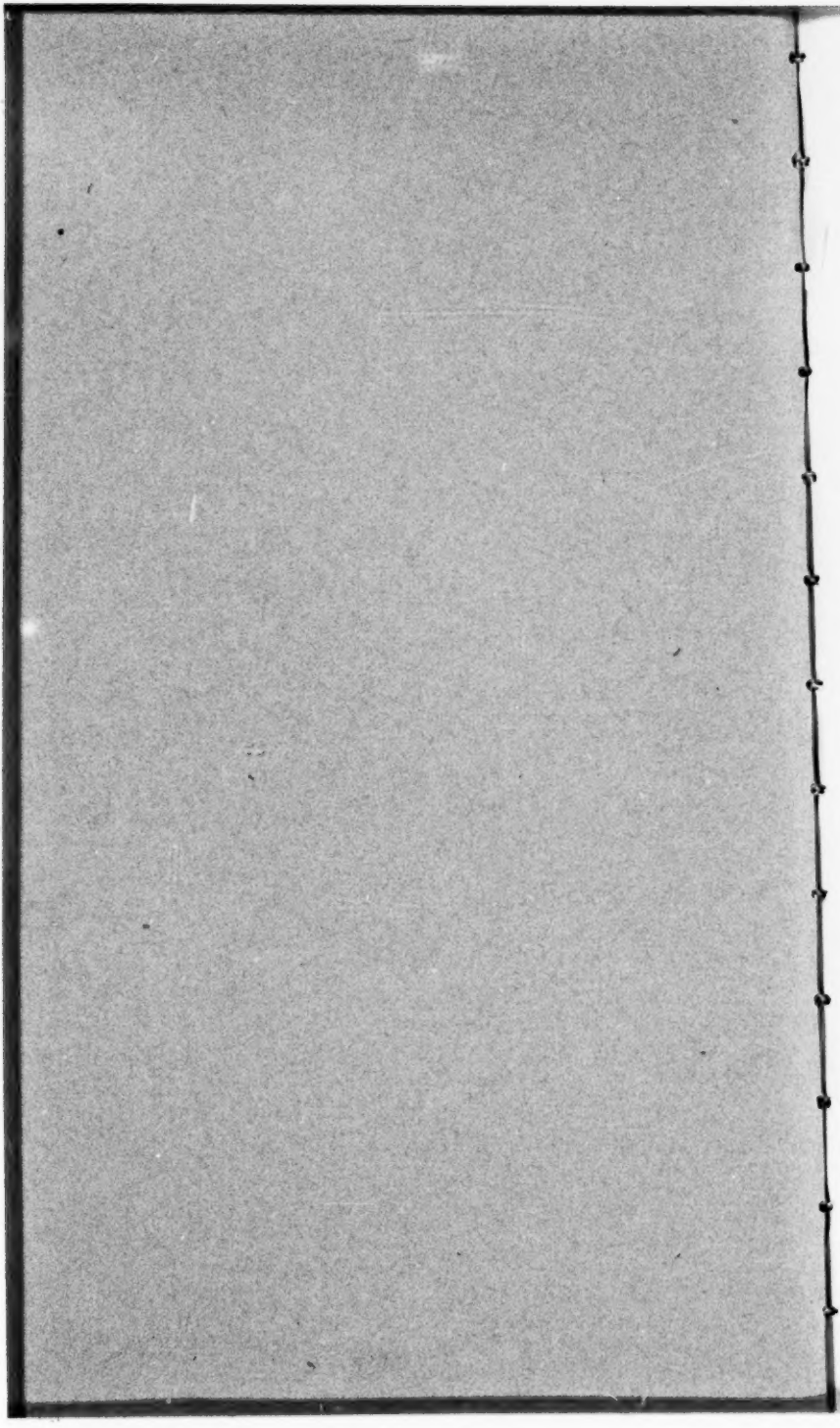
TIMOTHY DONOVAN, AS OWNER OF THE DECK SCOW "MARY ETHEL," AND THEODORE A. CRANE'S SONS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 17, 1924

ORDER GRANTING CERTIORARI FILED FEBRUARY 18, 1924

(30,067)



(30,067)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 757

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

vs.

TIMOTHY DONOVAN, AS OWNER OF THE DECK SCOW "MARY ETHEL," AND THEODORE A. CRANE'S SONS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Caption in C. C. A.	1	1
Record from U. S. district court	1	1
Statement	1	1
Libel and complaint	2	1
Answer	7	3
Answer of Theodore A. Crane's Sons Co.	11	5
Transcript of minutes	16	7
Testimony of John Kipp	17	7
Timothy J. Donovan	29	15
Charles Pero	31	16
Walter F. Williams	33	17
Walter D. Crane	35	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1924

	Original	Print
Testimony of George Bahrs	43	23
Opinion, Knox, J	49	27
Final decree	50	27
Stipulation re damages	52	28
Notice of appeal	53	29
Assignment of errors	55	29
Stipulation re exhibits	60	32
Stipulation re transcript of record	61	32
Clerk's certificate	62	32
Opinion, Mayer, J	63	33
Decree	67	35
Clerk's certificate	68	35
Order granting writ of certiorari	69	36

[fol. 1] **UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

TIMOTHY DONOVAN, as Owner of the Deck Scow "Mary Ethel,"

against

DIRECTOR GENERAL OF RAILROADS (New York, New Haven & Hartford Railroad Company) and THEODORE CRANE'S SONS COMPANY

STATEMENT

June 13, 1919.—Libel filed.
June 26, 1919.—Answer of Director General filed.
July 30, 1919.—Answer of Theodore A. Crane's Sons Company filed.
Nov. 13, 1922.—Case tried before Knox, D. J.
Nov. 14, 1922.—Opinion by Knox, D. J.
Jan. 12, 1923.—Final Decree filed and entered.
Jan. 31, 1923.—Notice of Appeal filed.
Feb. 21, 1923.—Assignments of Error filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

LIBEL AND COMPLAINT

To the Honorable The Judges of the United States District Court for the Southern District of New York:

The Libel and complaint of Timothy Donovan as owner of the deck scow "Mary Ethel", against Director General of Railroads of the United States (New York, New Haven and Hartford Railroad Company) and Theodore A. Crane's Sons Company, in a cause of collision, civil and maritime, respectfully shows:

First. That the libelant mentioned herein now is and at all of the times hereinafter mentioned was the sole owner of the deck scow "Mary Ethel" which vessel up to the time of the happening of the occurrence hereinafter described was in all respects tight, strong, staunch and seaworthy.

Second. On information and belief that Theodore A. Crane's Sons Company is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

Third. That heretofore on or about the 28th day of March, 1919, the scow "Mary Ethel", was lying safely and securely moored at Pier 2, Erie Basin, in the Basin. On said day, while vessel was lying as aforesaid the New York, New Haven and Hartford Railroad [fol. 3] Company car float #46 came into collision with the "Mary

Ethel" breaking several of the stern planks and rake pieces and opening the seams and doing other damage. At the time of the collision the car float #46 was not in charge of any other vessel.

Fourth. Upon information and belief that said New York, New Haven and Hartford Railroad car float #46 was at said Theodore A. Crane's Sons Company's repair yards undergoing or awaiting repairs and at all of the time afore-mentioned said #46 was in the custody of said Theodore A. Crane's Sons Company.

Fifth. That the said collision was caused without any fault, neglect or want of care on the part of the "Mary Ethel," or those in charge thereof, but solely through the fault, neglect and want of care of car float #46 and those in charge, custody and control of her, in the following among other particulars:

1. In that said car float #46 was not properly and safely moored.

2. In that said #46 was permitted to collide with a moored vessel.

3. In that said #46 was not kept properly and safely moored.

4. In that said #46 did not have an attentive and competent person on board or in charge to keep her from damaging other vessels.

5. In that no precaution was taken to protect the #46 from colliding with the "Mary Ethel."

[fol. 4] Sixth. That by reason of the premises libelant has been damaged in the cost of necessary repairs to said vessel, loss of the use of said vessel in a profitable employment, while undergoing repairs, salvage charges, towage, surveyor's and other charges, amounting in all to the sum of Five Hundred ($500) Dollars, payment of which has been demanded and refused.

Seventh. That on or about August 29th, 1916, the Congress of the United States passed and the President approved "An Act Making Appropriations for the Support of the Army" for the fiscal year ending June 30, 1917 and for other purposes, and provided therein (39 Stat. at L. 645) that the President in time of war was empowered through the Secretary of War to take possession and assume control of any system or systems of transportation, or any part thereof, all as more fully specified in said Act, and pursuant to said Act of Congress the President of the United States on or about December 26th, 1917 duly issued a proclamation whereby he took possession and assumed control on December 28, 1917 of each and every such system of transportation and the appurtenances thereof within the continental United States including systems of coastwise and inland transportation, and thereupon and in and by said proclamation the office of Director General of Railroads was created to exercise possession, control and operation of such transportation systems.

Eighth. That thereupon a Director General of Railroads was appointed, who took possession and control of said railroads and

[fol. 5] coastwise and inland transportation systems, and ever since December 28, 1917, the Director General of Railroads has exercised possession and control of and has operated the said railroad, coastwise and inland transportation systems and still continues to exercise such possession and control and to operate the said systems.

Ninth. That among the railroad and transportation systems of which the President of the United States through the Director General of Railroads, assumed the possession, control and operation as aforesaid, and still possesses, controls and operates is the New York, New Haven and Hartford Railroad.

That at all the times herein mentioned the Car Float #46 was managed, operated and owned by the said New York, New Haven and Hartford Railroad Company under the control or operation of the said Director General of Railroads.

Tenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelant prays that a citation issue in due form of law directed to the Director General of Railroads and said Theodore A. Crane's Sons Company citing them to appear and answer all and singular the matters aforesaid, and that libelant have judgment for the amount of his claim aforesaid with interest and costs, and that [fol. 6] libelant have such other and further relief as to the court shall seem just.

Foley & Martin, Proctors for Libelant, Office & P. O. Address: 64 Wall Street, Borough of Manhattan, New York City.

Jurat showing the foregoing was duly sworn to by Timothy Donovan omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Answer of the Director General of Railroads of the United States (New York, New Haven and Hartford Railroad), to the libel and complaint of Timothy Donovan, as owner of the deck scow "Mary Ethel," against Director General of Railroads of the United States (New York, New Haven and Hartford Railroad Company) and Theodore A. Crane's Sons Company, in a cause of collision, civil and maritime, alleges on information and belief and respectfully shows to this Honorable Court as follows:

First. Respondent has no knowledge or information sufficient to form a belief as to any of the allegations contained in article "First" of the libel.

Second. Respondent has no knowledge or information sufficient to form a belief as to any of the allegations contained in article "Second" of the libel.

Third. Respondent has no knowledge or information sufficient to [fol. 8] form a belief as to any of the allegations contained in article "Third" of the libel.

Fourth. Respondent admits the allegations contained in article "Fourth" of the libel.

Fifth. Respondent has no knowledge or information sufficient to form a belief as to any of the allegations contained in article "Fifth" of the libel.

Sixth. Respondent has no knowledge or information sufficient to form a belief as to any of the allegations contained in article "Sixth" of the libel.

Seventh. Respondent admits the allegations contained in article "Seventh" of the libel.

Eighth. Respondent admits the allegations contained in article "Eighth" of the libel.

Ninth. Respondent admits that at all the times mentioned in the libel Carfloat #46 was owned by the New York, New Haven and Hartford Railroad but denies that the New York, New Haven and Hartford Railroad managed or operated it, and denies that said Carfloat #46 was under the control or operation of the said Director General of Railroads, as alleged in article "Ninth" of the libel.

Tenth. Admits the jurisdiction of this Honorable Court but denies that all or singular the premises are true as alleged in article "Tenth" of the libel.

[fol. 9] Eleventh. Further answering respondent alleges that at all the times set forth in the libel he had no control over and was not in possession of New Haven Carfloat No. 46. But that on the contrary on or about March 25th, 1919, respondent delivered said Carfloat No. 46 into the possession of the Theodore A. Crane's Sons Company for dry docking and other repairs and received said float back from said Theodore A. Crane's Sons Company at about 5:00 P. M. on or about April 4th, 1919, and thereafter duly paid the said Crane Company the sum of Three Thousand Eight Hundred Eighty-four and 48/100ths Dollars ($3,884.48) for their services in making repairs to said Float No. 46. During all of the intervening time between said two dates and on March 28th, 1919, referred to in the libel, said Carfloat was exclusively in the possession and under the control of the officers and agents of said Theodore A. Crane's Sons Company at their dry dock in the Erie Basin.

Wherefore, Respondent demands judgment dismissing the libel herein with costs.

Charles M. Sheafe, Jr., Proctor for Respondent. Office & P. O. Address, Room 3610, Grand Central Terminal, Borough of Manhattan, City of New York.

[fol. 10] Jurat showing the foregoing was duly sworn to by Frank E. Hall; omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER OF THEODORE A. CRANE'S SONS CO.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Answer of Theodore A. Crane's Sons Company to the Libel and Complaint of Timothy Donovan as owner of the Deck Scow "Mary Ethel," against Director General of Railroads of the United States (New York, New Haven and Hartford Railroad Company) and Theodore A. Crane's Sons Company, in a cause of collision, civil and maritime, alleges as follows:

First. That the Respondent, Theodore A. Crane's Sons Company, has appeared herein and filed the usual Stipulation for Costs, in accordance with the rules and practice of this Court in such cases.

Second. Upon information and belief, it admits the allegation of the "First" Article of the Libel, which alleges:

"That the libellant mentioned herein now is and at all of the times hereinafter mentioned was the sole owner of the deck scow 'Mary Ethel,'"

but it denies the remaining allegations thereof.

Third. It denies the allegations of the "Second" Article of the Libel.

[fol. 12] Fourth. It denies the allegations of the "Third" Article of the Libel.

Fifth. It denies the allegation of the "Fourth" Article of the Libel, which alleges: "undergoing or"; and also the further allegations which alleges:

"and at all the times aforementioned said No. 46 was in the custody of said Theodore A. Crane's Sons Company";

but it admits the remaining allegations thereof.

Sixth. It denies the allegations of the "Fifth" Article of the Libel, which alleges:

"That the said collision was caused without any fault, neglect or want of care on the part of the 'Mary Ethel'";

and it denies that it has any knowledge or information sufficient to form a belief as to the faults charged against the said Carfloat "No. 46" in the said "Fifth" Article of the Libel, and, therefore, leaves the libellant to his proof of same.

Seventh. It denies the allegations of the "Sixth" Article of the Libel.

Eighth. It denies that it has any knowledge or information sufficient to form a belief as to the allegations of the "Seventh" Article of the Libel, and leaves the libellant to his proof of same.

Ninth. It denies that it has any knowledge or information sufficient to form a belief as to the allegations of the "Eighth" Article [fol. 13] of the Libel, and leaves the libellant to his proof of same.

Tenth. It denies that it has any knowledge or information sufficient to form a belief as to the allegations of the "Ninth" Article of the Libel, and leaves the libellant to his proof — same.

Eleventh. It denies that it has any knowledge or information sufficient to form a belief as to the allegations of the "Tenth" Article of the Libel, and leaves the libellant to his proof of same.

Twelfth. It denies the allegation of the "Ninth" Article (error: should be "Eleventh" Article) of the Libel, which alleges: "That all and singular the premises are true," but admits the remaining allegation thereof.

Further answering, and as a further defense, the respondent, Theodore A. Crane's Sons Company, alleges, upon information and belief:

Thirteenth. That on the 28th day of March, 1919, the New York Central Carfloat was lying next to the pier on the premises of the respondent, Theodore A. Crane's Sons Company, and Carfloat "No. 46," belonging to the New York, New Haven and Hartford Railroad Company, was lying alongside and to the outside of said float. A New York Central Tug, or a tug representing the New York Central Railroad Company, came in to take the New York Central Float [fol. 14] away, and in order to do so had to shift said Carfloat "No. 46," and in doing so let go of the lines, causing said carfloat to drift.

The respondent, Theodore A. Crane's Sons Company, had nothing whatever to do with the shifting of the said New York Central Float or with the management of the said tug, and if there was any damage caused, growing out of the said shifting, it was caused solely through the fault of the people shifting the said New York Central Float; and the respondent, Theodore A. Crane's Sons Company, is in no way liable therefor; and there is no law requiring the respond-

ent, Theodore A. Crane's Sons Company, to have a watchman or keeper on board of the boats belonging to its customers.

Fourteenth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the respondent, Theodore A. Crane's Sons Company, prays that the Libel herein so far as it affects said Theodore A. Crane's Sons Company be dismissed with costs.

Carter & Carter, Proctors for Respondent, Theodore A. Crane's Sons Company, 15 Whitehall Street, Manhattan, New York City.

[fol. 15] Jurat showing the foregoing was duly sworn to by Walter D. Crane; omitted in printing.

[fol. 16] UNITED STATES DISTRICT COURT

TRANSCRIPT OF MINUTES

Counsel state their claims.

Mr. Carter: I move that the libel against Theodore Crane's Sons Company should be dismissed.

Denied.

Exception.

[fol. 17] JOHN KIPP, a witness called on behalf of the libellant, being duly sworn, testified as follows:

Direct examination by Mr. Martin:

Q. Where do you live?
A. Keyport, New Jersey.
Q. What is your business?
A. Boatman.
Q. What boat are you on?
A. June Nord.
Q. What boat were you on on March 29, 1919?
A. The Robert R.
Q. Who owned her?
A. Jacob Rice & Sons.
Q. On March 28, 1919, was your boat in Erie Basin?
A. Yes, sir.
Q. Where were you lying?
A. On the end of Pier 2.
Q. What other boats were near you?
A. The Mary Ethel and the Guard and the John O'Rourke.
Q. Take the Guard first. What pier did she lie at?
A. On the end of Pier 2.
Q. She was next to the pier?
A. Yes, sir.

Q. What was outside of her?
A. The Mary Ethel.
Q. And your boat was where?
A. I was tied on the stern of the Mary Ethel.
Q. Directly across the stern or diagonally?
A. On a kind of diagonally off.
Q. Held up from the stern?
A. Held up from the stern by a line from the Mary Ethel.
Q. You had been lying in that position the better part of the day?
A. From early in the morning till seven or eight that night.
Q. And during the afternoon of that day did you see any vessel come in contact with the Mary Ethel?
A. The carfloat.
[fol. 18] Q. What carfloat was it?
A. New York, New Haven & Hartford No. 46.
Q. Did you see where she came from?
A. Crane's Shipyard.
Q. Do you know what the number of the carfloat was?
A. 46, I think.
Q. Did you see the 46 lying over at Crane's earlier in the day?
A. I see two or three lying over there.
Q. And among them the 46?
A. Among them the 46.
Q. And did you see the 46 come across?
A. Yes, sir.

Mr. Carter: I object.
Mr. Martin: Strike it out.

Q. You saw the 46 at Crane's?
A. Yes, sir.
Q. Now, in the afternoon of that day what did the 46 do?
A. I seen her come across alongside of the Mary Ethel.
Q. Was anything attached to her?
A. A small scow.
Q. When they came across where did they land?
A. The small scow landed on the Mary Ethel's stern and the carfloat alongside of her.
Q. What time of the day was that?
A. Well, now, that's pretty hard to tell. I should judge two or three in the afternoon. It is so long ago I don't know exactly.
Q. Was there a wind that day?
A. Yes, blowing pretty heavy.
Q. When this carfloat and scow landed as you have described did they stay there?
A. They were all there at noon, yes, sir.
[fol. 19] Q. While lying there did you see what they were doing in reference to this Mary Ethel?
A. They were chafing the scow under her stern, the small scow.
Q. Where was the carfloat?
A. Right there.
Q. Was the lying down——

Mr. Carter: I object to this testimony as incompetent.
Objection overruled.
Exception.

Q. What was this carfloat doing?
A. She lay alongside. She was back of the bridge and went to move a carfloat out but whether she was doing any damage or not I could not tell.
Q. But you saw the little boat attached to the carfloat under the stern?
A. Yes, sir, she was bouncing up and down under her stern.
Q. Was she striking the stern or not?
A. Oh, yes; she was striking the stern.

The Court: She lay there are the afternoon?
The Witness: She came over there about 2:30 or 3 in the afternoon. I could not tell exactly the time.

Q. You said she was chafing on the stern of the Mary Ethel?
A. Yes, sir.
Q. Could you see that yourself?
A. Yes, sir, it was the forward part of my boat.
Q. What part of the stern was it where this scow was rising up and down?
A. About halfway up, under the stern.
[fol. 20] Q. What kind of a stern has the Mary Ethel?
A. A regular stern; the regular stern.
Q. Was the Mary Ethel light or loaded?
A. Light.
Q. Was the Mary Ethel lower or higher than the scow?
A. Higher.
Q. Was or was not this scow able to get in under this rake of the Mary Ethel?
A. Yes.
Q. Was it in under?
A. It was in under, yes, sir.
Q. You lay off which corner or what part of the stern of the Mary Ethel?
A. She had a line from her starboard side to my forward.
Q. And you came in on which side of the Mary Ethel's stern, or did you reach the stern?
A. I did not reach to the stern.
Q. You were not to the stern?
A. No, sir, I was clear of the stern.

The Court: How much distance was there between you and the stern?
The Witness: About 85 feet.

Cross-examination by Mr. Brumley:

Q. Did the scow and the float come down together?
A. Yes, sir.

Q. Were they attached?
A. Yes, sir.
Q. How were they attached, do you know?
A. Well, I suppose the small scow was tied alongside of the railroad float.
Q. Did you see how many ropes were out?
A. No, sir, I did not.
Q. When did you first see this float on March 28th?
A. Well, I seen her when she first came and before she left. I see [fol. 21] the New York Central when she come out and took the float on the other side.

The Court: You saw the New York Central take the boat out?
The Witness: Yes, sir.

Q. You saw a tug with the name New York Central on it, is that it?
A. Yes, sir.
Q. And you saw that tug do what?
A. Take a float out on the other side.

The Court: That is inside the New York, New Haven carfloat?
The Witness: I think she was inside; I could not tell. I know when she took her out I saw them come adrift.

Q. You won't say that the float that the New York Central tug took out was between the pier and the New Haven float?
A. I could not tell you, no, sir.
Q. Well, now, before the New Haven float went adrift where was the scow in reference to it?
A. Laying alongside of the Guard at the end of Pier 2, Erie Basin.
Q. Was the scow between the New Haven float and the pier?
A. No, sir.
Q. Was it outside of the New Haven float?
A. It was on the inside, but on the outside of the Guard.

Mr. Martin: I think you are speaking of different boats.

Q. I am speaking of——

[fol. 22] The Court: When the boats lay at Crane's dock was the scow inside or outside?
The Witness: She was inside of her, between her and the Guard.
Mr. Martin: The Guard was the boat at Pier 2.
The Witness: At the end of Pier 2, and the Mary Ethel on the outside.

By Mr. Martin:

Q. When you saw the carfloat of No. 46 there was a small scow inside of her at Crane's. Was that on the outside or inside of No. 46?
A. Inside.
Q. Was that nearer to the Mary Ethel or nearer to the carfloat?
A. It was nearer, the small scow lay on the inside of the float, if that is what he wants to know.

Q. Where is Crane's in reference to Pier 2, directly across or above or below?
A. No. Pier 2 is here and Crane's is over here (indicating).
Q. Diagonal position?
A. Yes, sir.

By Mr. Brumley:

Q. Will you please mark on this page Pier 2 of Crane's?
A. Here comes Pier 2 here and Crane's lays about over here (marking on the yellow pad).
Q. Where were you?
A. Where was I? I laid right here about this direction on Pier 2. (Witness marks on diagram.) Now, here is my scow, here, see; like that, and here lays on the end of Pier 2 the Guard and the Mary Ethel alongside of that (witness indicates on diagram).

[fol. 23] By Mr. Martin.

Q. Yours is the Robert R.?
A. Yes, sir, mine is the Robert R.

By Mr. Brumley:

Q. Now, where was the New Haven float No. 46?
A. When she came adrift?
Q. No, just before?
A. Before she came adrift she lay out here in this direction, toward Crane's shipyard (indicating on diagram). She lay in there.
Q. Where was the scow?
A. The scow was alongside of the float there (indicating).
Q. Where was the New York Central float, if you know?
A. She lay, I think—I am pretty sure——
Q. You don't know?
A. No, but I think she law on the inside; I could not say where she was, but I think she lay on the inside of 46. I could not say where she was.
Q. You don't know?
A. I don't know.

Diagram offered in evidence.
Received and marked Libellant's Exhibit 1.

Q. Was anybody on the Mary Ethel at the time?
A. There was not at the time the carfloat came there, no, sir. He left there about ten o'clock in the morning.
Q. Did you see anybody all during the afternoon?
A. No.
Q. And was anybody on the New Haven float?
A. No, sir.
Q. Was anybody on the scow?
A. Not as I know of, I didn't see nobody.

[fol. 24] Q. And the New Haven float and the scow went down adrift, is that it?

A. Yes, sir.

Q. Did you see them just before they went adrift?

A. I see them laying over there at Crane's shipyard. I supposed it was all the same lot.

Q. You saw them when they were lying at Crane's?

A. Yes.

Q. And the next time you saw them you saw them when they came up against the Mary Ethel?

A. Yes, sir.

Q. Isn't that right?

A. That is right.

Q. You yourself don't know what caused them to go adrift, do you?

A. I don't, no, sir.

Q. And what time of the day was it that the collision occurred?

A. I think half past two or three in the afternoon, as near as I can tell.

Q. Do you know to whom the scow belonged?

A. Well, yes, sir, I did know.

Q. Did he have any name on it?

A. What do you mean; the small scow?

Q. Yes, sir.

A. No, sir; no, sir; I do not, no, I don't about that one.

Q. Did you see the New Haven name on the float?

A. Yes, sir; No. 46.

Q. It was the No. 46?

A. It was the No. 46, yes, sir.

Cross-examination by Mr. Carter:

Q. Captain, where did you come from when you landed at Pier 2, Erie Basin, that morning?

A. Port Liberty.

Q. How did you get there from Port Liberty?

A. Well, as near as I can tell the wind blowed us there.

[fol. 25] Q. Were you on board of your boat from Port Liberty?

A. Yes, sir.

Q. Then you must have known how you got there?

A. Yes, sir, the wind blowed us.

Q. You broke adrift at Port Liberty?

A. Yes, sir.

Q. What direction was the wind, if you know?

A. About northwest.

Q. That blows right over towards Erie Basin?

A. Yes, sir.

Q. When this carfloat of the New York, New Haven & Hartford as you saw it drifting, was it drifting quick down towards the canal boat?

A. It come pretty quick, yes, sir.

Q. Did I understand you to say that you saw the New York Central tug go in there and pull out that carfloat between the pier and here?

A. I see the New York Central boat come in, yes, sir.

Q. And from what you observed the work of the New York Central boat was pretty quick in getting that float out?

A. Well,——

Q. It was quick work?

A. Well, quick,—so that they got adrift. When the wind is like that you can't work very quick but they done it as soon as they could.

Q. Wasn't that a big tug?

A. That was a big tug; I could not tell you what it was, though.

Q. And if she worked quick did she let go both the lines of the New York, New Haven & Hartford float 46?

A. That I could not tell you.

Q. How did you see her swing when they pulled out the carfloat between the pier and *and* the New Haven boat; how did you see the swing of the carfloat and the tug?

[fol. 26] A. I could not tell you that: I know it went out of there, but which way she swung I could not tell you.

Q. In other words the minute you saw the New York Central tug come in to take out that carfloat lying between the New Haven and the barge, the next thing you knew was that the New York came down on top of the Mary Ethel?

A. Yes, sir.

Q. Quick work?

A. Yes, quick work because the wind was blowing heavy.

Q. Have you any idea of what the storm was in velocity?

Mr. Martin: I object, it is not pleaded.

The Court: Well, it may have some bearing.

Q. What do you think was the velocity?

A. Well, I don't know; it was blowing pretty heavy.

Q. You never made a test of velocity of wind?

A. No, sir; but I should judge it was blowing about 65 miles an hour.

Q. You came over pretty fast from Jersey City to the Basin?

Mr. Martin: I object.

The Court: The Robert R. had been adrift earlier in the day?

The Witness: Yes, sir.

The Court: And you had been blown across the Bay?

The Witness: Yes, sir; and landed into Erie Basin.

The Court: You did not hit the Mary Ethel?

The Witness: She come with me; she was alongside of me when [fol. 27] we left. She had a line alongside of me and that night the line parted.

The Court: Both the Mary Ethel and the Robert R. came across that day?

The Witness: Yes, sir; me and the Guard.

By Mr. Martin:

Q. What time of the day?

—. Four o'clock in the morning we left Port Liberty and at five we tied up.

Q. I understood you to say that you did not see the New York Central go in to take out a float?

A. I did not say I did not see it; I said the New York Central did go in there and take out a float.

Q. You saw that?

A. I saw that; yes, sir.

Q. Did you see the float that it took out?

A. No, sir.

Q. Did you see the location of the float that it took out?

A. Well, it was a carfloat.

Q. In reference to the New Haven float 46 do you know whether——

A. Whether she pulled out one of her floats or somebody else's?

Q. Yes.

A. That I could not tell you.

Q. The scow was between the 46 and the pier, wasn't it, the scow?

A. Yes, the small scow was; she was between.

Mr. Martin: You are both speaking of different times.

Q. Just before the New Haven float went adrift the small scow was between the New Haven float and Crane's pier, is that right?

A. No, the small scow lay on the port side of the railroad float.

[fol. 28] Q. What was between the railroad float and the pier?

A. The pier? Which pier?

Q. Crane's pier?

A. Nothing.

Q. So that the New Haven float was tied to Crane's pier?

A. I think it was; yes, sir.

Q. So far as you know?

A. As far as I know; yes, sir.

Q. And do you know where the New York Central float was just before she was taken out in reference to the New Haven float?

A. I think she was over in Crane's.

Q. You don't know whether she was tied alongside or not, do you?

A. I do not, no, sir.

Q. And you did not see the New Haven float No. 46 with a scow attached at the time it started to go adrift, did you?

A. No, I could not tell you which scow it was, but I see her after she landed alongside of the Mary Ethel; that is the time I see her. I see her coming over there adrift and landing alongside of her.

By Mr. Martin:

Q. You saw the rake part of the stern of the Mary Ethel during the day?

A. Yes, sir.

Q. And before the carfloat and this scow came in under the stern?
A. Yes, sir.
Q. Was it all right?
A. Yes, sir.
Q. And you saw it after the scow and carfloat was taken away?
A. I seen it was chawed up. I didn't go aboard and see it but I see it from the outside and I could see it.
Q. You saw it at the different times you have spoken of?
A. Yes, sir; it was chawed up.

[fol. 29] TIMOTHY J. DONOVAN, a witness called on behalf of the libellant, having been duly sworn, testified as follows:

By Mr. Martin:

Q. Are you the libellant?
A. My father is the libellant. I am his agent.
Q. He is the owner of the Mary Ellen?
A. Yes, sir.
Q. On the 29th of March did you go over and look at the Mary Ethel?
A. Yes, sir.
Q. Did you examine her inside?
A. Yes, sir.
Q. Did you subsequently hold a survey on notice to these parties?
A. Yes, sir.
Q. Is this the survey that was held?
A. Yes, sir. (Witness examines paper.)

Mr. Martin: I offer it in evidence.
Mr. Carter: I object to it unless it affects Crane's Sons, and it is not in order to prove damage now.
Mr. Martin: I am not trying to prove damages.

Survey received in evidence and marked Libellant's Exhibit 2.

Q. Did you examine the damage on the following day?
A. Yes, sir. I was there in the afternoon.
Q. What did you find?
A. I found the outside of the stern on the starboard quarter——

Mr. Carter: This is all taken under the same objection as incompetent.

[fol. 30] A. (continued). I found the starboard quarter under the stern was chawed up badly and there was evidence there that it had been struck quite hard at different times. I went on the inside and found two rake timbers broken on the inside. Everything was fresh breaks, you could tell that.
Q. Do you recall who was the captain?
A. Walter Clark.
Q. Have you tried to locate him?

A. Yes, sir; and nobody has seen him for over two years. I have inquired at the usual places and made inquiry all around and nobody has seen him in the last two years.

Cross-examination by Mr. Brumley:

Q. Did you invite the New Haven to the survey?
A. Yes, sir; we have a copy of the letter there and they acknowledged the receipt of it.
Q. Nobody was present from the New Haven, was there?
A. No, sir; not at the time, but he came two or three hours late, after the survey had been held.

Libellant's case closed.

[fol. 31] CHARLES PERO, a witness called on behalf of the Director General, being duly sworn, testifies as follows:

Direct examination by Mr. Brumley:

Q. Captain, you are in the employ of the New Haven Railroad?
A. Yes, sir.
Q. And on March 24 and 25, 1919, you were captain of what transfer?
A. Transfer No. 8.
Q. I show you a log sheet and I ask you whether that was kept in your handwriting?
—. Yes, sir.
Q. Will you please look at it and tell the Court what movement was made by Transfer No. 8 with reference to Float No. 46 on March 24 and 25?

Mr. Martin: I object as irrelevant, incompetent and immaterial. This accident happened on the 28th.
Mr. Brumley: The object of the testimony is to show that the New Haven delivered it at Crane's pier on the morning of the 25th.
Mr. Martin: Then as far as the libellant is concerned, I withdraw my objection.
Mr. Carter: I object as immaterial.
Objection overruled.

A. He went in there on the 25th at 12.20 and tied to a float up alongside or another float which I thought was a New York Central; I was told by a deckhand and we tied her there safely.
Q. Were you there when she was tied up?
A. Yes, sir.
Q. Describe what was done?
A. We tied her up. We put her alongside of this float. We got orders from the watchman to put out three parts of the head line, [fol. 32] three amidships and three parts astern, which made nine parts of the line altogether.

The Court: You tied her up alongside of New York Central?

The Witness: I got the statement from the deckhand that it was the New York Central.

Q. When you arrived at Crane's pier what did you do?
A. I blowed for the watchman.
Q. Did the watchman come?
A. Not at the first time, but I blowed the second time which he come down.
Q. And then what happened?

Mr. Carter: Objected to as incompetent.
Objection overruled.
Exception

Q. Then what happened?
A. He come down and told us to tie up alongside of the float that lay there.
Q. Did you do that?
A. We did that.
Q. When did you leave?
A. We left at 12.45.
Q. Where did you bring the 46 from?
A. From 112th Street.

Mr. Martin: No cross-examination.
Mr. Carter: No cross-examination.
The Court: Did your lines go across to the pier?
The Witness: No, sir; onto the New York Central float.

[fol. 33] WALTER F. WILLIAMS, a witness called on behalf of the Director General, being duly sworn, testified as follows:

Direct examination by Mr. Brumley:

Q. On March 24 and 25, 1919, what was your position with the New Haven?
A. First deckhand on No. 8.
Q. Were you on Transfer No. 8 on the night of March 24 and the morning of March 25?
A. Yes, sir.
Q. Were you at Crane's dock when the float 46 was tied up?
A. Yes, sir.
Q. Who tied float 46?
A. Myself and the floatman.
Q. To what did you tie up?
A. New York Central float.
Q. How was it tied?
A. Tied with nine parts of a line; three forward, three amidships, three aft.
Q. And that was about what time?

A. About 12:25.
Q. On the morning of the 25th?
A. On the morning of the 25th, yes, sir.

By Mr. Martin:

Q. What float of the New York Central did you make fast to?
A. I cannot tell just the number because I can't remember it, but I know it was the New York Central because I have worked for them and I can tell their floats. It happened that I tied the line amidships just abreast of the New York Central name on the sign-board.

[fol. 34] Mr. Brumley: I offer in evidence the bill of Theodore A. Crane's Sons Company for the repair work done on the float at this time.

Mr. Carter: I object to it so far as it affects any question here as to liability. I will admit that it was repaired by Crane's, but I object as immaterial and incompetent.

Mr. Brumley: It was delivered on the 25th and she went on the drydock on the 26th, came off drydock on the 27th and she was repaired by April 4th and the New Haven took possession of her again on April 6th.

The Court: Let the record show that there is no denial on the part of Crane's Sons that work was done on this boat.

Mr. Carter: I simply object as to the materiality.

Bill received in evidence and marked Exhibit A.

The Court: I will allow it in showing that they did work both prior to and after this accident, and Mr. Carter reserves an exception as to its materiality.

Mr. Brumley: May it be stipulated that from the 28th, the time of the accident, the boat was undergoing repairs by Crane's Sons, throughout that period from March 26th to April 4th it was in their possession, undergoing the repairs by them.

Mr. Carter: I object to that as incompetent.

The Court: Do you admit the fact that work was being done on her on the 28th?

Mr. Carter: Yes.

The Court: Very well; let the fact be shown on the record and you reserve an exception as to the materiality and relevancy of it.

The Director General Rests.

[fol. 35] Mr. Carter: On the part of Crane and facts as presented by the libellant's pleadings and testimony and on the New York, New Haven & Hartford pleadings under their answer there has been no testimony in any way to connect Theodore Crane's Sons Company with any question of any liability with reference to care and custody of this carfloat. No evidence has been produced.

The Court: In view of the fact that you were working on her I am not sure whether it was not your duty to keep this fact. That I will have to consider and you had better put on your witnesses.

WALTER D. CRANE, a witness called on behalf of Theodore Crane's Sons Co., being duly sworn, testified as follows:

Direct examination by Mr. Carter:

Q. Mr. Crane, in the month of March, 1919, what was your position in the Theodore A. Crane Sons' Company?
A. Treasurer.
Q. And the company has been in business for how long?
A. Over thirty years.
Q. Do you remember the carfloat No. 46 of the New York, New Haven & Hartford Railroad Company?
A. Yes, sir.
Q. How do you know what I am going to ask you? Do you remember the New York, New Haven & Hartford Carfloat No. 46 coming to your dock to be repaired?
A. Yes, sir.
[fol. 36] Q. Now, when a carfloat comes to your dock, such as the New York, New Haven, & Hartford Railroad Company's float, what has your company got to do in regard to that carfloat?

Mr. Brumley: I object to that. It is calling for a conclusion.
Mr. Carter: You have alleged it in your answer.

Q. What did you do with reference to this boat?
A. Well, they bring the float in to us for repairs and we do what we are told.
Q. When you receive the carfloat do you take full possession of her and control of everything of that carfloat?

Mr. Martin: Objected to.
Objection sustained.

Q. What did you do?
A. They are supposed to have a captain or a watchman on those floats.
Q. What does your company have to do with making them fast?
A. We don't make them fast, we don't assume responsibility.
Q. If the carfloat desires to be moved on to your drydock and then made fast again, your company does that?
A. Yes, we take care of the float when we are drydocking it.
Q. But until that boat, such as No. 46, is to be repaired, you have nothing further to do with her until you are ready to commence the work? A. Yes, sir.

The Court: Did she come off the drydock on the 28th?
[fol. 37] Mr. Martin: On the 27th.
The Court: Did you tie her up after she came off the drydock?
The Witness: We pulled her off the dock and lay her alongside of the New York Central float.
The Court: Then you did take her off the dock and put her alongside of the New York Central?
The Witness: Yes, sir.

By Mr. Carter:

Q. How were her fastenings then?
A. Well, fast, she had good heavy hawsers, good lines on.
Q. As far as you know, of your own knowledge, did any one representing your company in any way authorize the New York Central to come in between the pier and the carfloat No. 46 and to let go the No. 46 lines?
A. No, sir.
Q. When tugboats come in to take out a carfloat that might lay between a dock and another barge, or outside of another barge that may be fast to your dock, do you have anything to do with directing as to how that boat shall be taken out, either inside or outside?

Mr. Brumley: I object to those general quesstions.
The Court: Yes.
The Court: Did you give any instructions in this particular case?

By Mr. Carter:

Q. What did you do about it, what do you do about it?
A. We don't take the responsibility——

[fol. 38] Mr. Brumley: I object.
The Court: You did not have any conversation with anybody on the New York Central tug?
The Witness: No, sir.

By Mr. Carter:

Q. Nor on the New York, New Haven & Hartford, did you?
A. No, sir.

The Court: Had the New York Central boat been repaired?
The Witness: She was under repairs, she was finished and then we report that the vessel is finished and they send a tug in and tow her away.
The Court: They knew she was to be taken away?
The Witness: Well, of course, we don't know what time, they assume that themselves.

Cross-examination by Mr. Martin:

Q. Mr. Crane, your men were working on the No. 46 on the 28th, weren't they?
A. Yes, sir.
Q. And you had that small working float alongside at the time?
A. Yes, sir; a float stage.
Q. And that also went adrift with the carfloat?
A. I assume so, I didn't see it, but it must have gone with it.
Q. And that float stage was your company's?
A. Yes, sir.
Q. And used by your workmen in working on the 26?
A. Yes, sir.

[fol. 39] Q. As the No. 46 lay at your pier, do you recollect whether that stage lay outside?
A. I could not say, I did not see it.

The Court: Was there another scow in addition to the float stage alongside of No. 46?
The Witness: I did not see that scow.

By Mr. Martin:

Q. Describe the float stage.
A. Well, it is 30 or 40 feet long, some of them 20 feet along, and about level with the water, about 20 feet wide, some of them 10 feet wide, different sizes, flat, very low in the water.
Q. But just the same as a scow would be?
A. Yes, sir.
Q. You might call it a scow or a flat stage, but you call it a flat stage, being familiar with the yard term?
A. Yes, sir.
Q. That is right, is it?
A. Yes, sir.

Cross-examination by Mr. Brumley:

Q. And at the time, your men were working on that stage?
A. I could not say.
Q. You don't know?
A. I don't know.
Q. Did you see where Float No. 46 was tied on March 28th?
A. She was fastened to the New York Central float.
Q. You saw that yourself?
A. Yes, sir.
Q. Did you see the float after it had come in and before it had gone on the drydock?
A. No. 46? I saw her on the drydock.
[fol. 40] Q. I ask you whether you saw it before she went on the drydock?
A. I don't think so.
Q. You know that your company moved it from the place she was moored to the drydock?
A. To go on the drydock.
Q. And your company moved it from the drydock to the pier?
A. Yes, sir. Well, she lay alongside of the New York Central float.
Q. That is true?
A. Yes, sir.
Q. When did you finish work on her?
A. I could not say.
Q. But it was after March 28th?
A. I couldn't say that either.
Q. You saw the bill?
A. Well, no. It is so long ago, I would have to look at it.

Q. You did not see the drifting yourself?
A. No.
Q. You don't know anything about that?
A. No.
Q. You did not see a New York Central tug come in?
A. No.
Q. You did not see the New York Central tug pull out any float?
A No.
Q. You did not know anything about it until after it all happened?
A. Well, they came up and told me that the New York Central float had pulled out, that's all I know.
Q. I did not ask for that.

Mr. Crane: Counsel cannot object to the answer.
The Court: He asked whether he knew anything about it until after, and the witness says he did not.
Mr. Brumley: That is right.

[fol. 41] Q. I think on direct examination, you testified that it was the practice and custom, and the obligation to have a watchman or somebody on those floats?
A. They have somebody looking after them.
Q. Now assuming in this case that this float was in your place from March 25th to April 6th, do you mean to say that it was the practice for the owner of the float to have somebody on that float as a watchman during that time?
A. We do not assume any responsibility while they are under repair in our yard.
Q. I did not ask you that. I asked you whether it was the practice, for instance, under the conditions here, to have somebody on the float as a watchman?
A. Well, there is a watchman on the float. I cannot say whether he was there at the time.

The Court: While boats are at your dock under repairs, is it the ordinary practice to have a watchman on board to take care of her and look after her lines?
The Witness: Yes, sir.

By Mr. Brumley:

Q. An employee of the owner?
A. No, sir; he is employed by the Railroad.
Q. That is the practice, is it?
A. Yes, sir.
Q. And it would be the practice to have a day and night watchman?
A. I cannot answer that question, whether it is day and night.
Q. Was it the practice to have a night watchman?
A. They generally do have a watchman on them.
Q. They do?
A. Yes, sir.

[fol. 42] Q. The New York Central does that?
A. I know the New Haven have a watchman on their floats.
Q. When they are under repairs?
A. Well, I won't say that, but I see the watchman there when the floats come in.
Q. Yes, but after they have come in and are tied up to your dock, and are being repaired by you, does the New Haven have watchmen on those floats?
A. I can't say.
Q. You don't know.
A. No.
Q. Then you don't know whether it is the practice under those conditions to have watchmen on the floats, do you?
A. All I can say is, we don't assume responsibility.

Mr. Brumley: That is an entirely different question. I move to strike that out.
The Court: Yes, strike that out.

Redirect examination by Mr. Carter:

Q. Whether or not there is a watchman on a carfloat such as the No. 46 coming to your dock, do you assume any responsibility——

Mr. Brumley: I object.
The Court: That does not make any difference unless there is a contract to assume responsibility, that is one thing but his judgment is another thing.

Q. You had no contract with the New York, New Haven and Hartford when this boat came to be repaired as to the care and custody of her?
A. No, sir.

[fol. 43] GEORGE BAHRS, a witness called on behalf of the Theodore Crane Son's Company, being duly sworn, testified as follows:

Direct examination by Mr. Carter:

Q. On the 28th of March, 1919, what was your position with the Theodore A. Crane's Sons Company?
A. Dockmaster.
Q. How long had you been in their employ up to that time, with Crane & Company?
A. Two years.
Q. Do you remember about noontime of March 28, 1919, of seeing anything that took place at your dock at Erie Basin in reference to the carfloats that were there?
A. Yes, sir.
Q. What did you see?
A. That the New York, New Haven float was adrift.
Q. When you first saw her adrift, where were you?
A. I was on my way down to see what let it go adrift.

Q. Where were you when you were on your way down, what part of the yard were you?
A. It was up towards Gokey's, where the office is.
Q. How far would that be from where the carfloat was first fast?
A. Twelve or fourteen hundred feet.
Q. What called your attention to the fact that this No. 46 was adrift?
A. I see her adrift down there.
Q. Do you know how she got adrift?
A. Yes, sir.
Q. How?
A. The New York Central went in and took out a float.
Q. What had you to do, if anything, with the New York, New Haven & Hartford No. 46, in regard to the care or custody of her [fol. 44] while she lay at her dock?

Mr. Brumley: I object. That calls for a conclusion of law.
Mr. Carter: I think it is a proper question.

Q. Well, what did you do with her?
A. Dry docked her.
Q. Well, before they go on the dry dock, what have you got to do with them?

Mr. Brumley: I object to the form of the question.

Q. What did you do before she went on the pier?
A. The float? I did nothing to the float.
Q. Who makes those carfloats fast?
A. I do.
Q. When they come in?
A. I do, unless it is night-time, then the watchman, I have my men do it.

The Court: Did you make Float No. 46 fast?
The Witness: Yes, sir.

Q. Had she been fast the night before?
A. Yes, sir.
Q. And up to the time you saw her adrift?
A. Yes, sir.
Q. How was she fast, the No. 46?
A. The New Haven?
Q. Yes.
A. Fastened to the New York Central.
Q. How was she fastened?
A. A bight on both ends, six parts in each end.
Q. From your experience, seeing boats made fast, what would youu [fol. 45] say as to whether or not that carfloat was properly made fast?
A. She was properly made fast, with the experience of the wind she had she didn't get adrift that night.

The Court: There was no parting of lines?

By Mr. Carter:

Q. Did you see them cast the lines off?
A. No, sir.

The Court: Was the New York Central alongside of the dock, or tied head on?
The Witness: The New York Central lay in Section 12, alongside of the pier; outside of her lay the New Haven.

Q. And when you first saw the New York, New Haven carfloat No. 46 adrift, how was she adrift?
A. All I could see was one end coming over. I do not know which end it was coming, but by the time I got around there she was over again, around some boats.
Q. Had the New York Central carfloat man, or the tugboat man asked any permission from you to permit her to go inside and take her the way he did?
A. No, sir, not that day.
Q. Did the men on the No. 46 ask your permission to allow the New York Central tugboat to come in and take out the carfloat?
A. No, sir.

Cross-examination by Mr. Martin:

Q. What did you see alongside of the No. 46 as she was drifting over?
A. A couple of float stages.
Q. There are Crane's working float stages?
A. Yes, sir.
[fol. 46] Q. They have been referred to here as scows?
A. Yes, sir.
Q. You saw them go and strike?
A. I didn't see them going, they were on their way over when I was coming around the piers, I didn't see them strike, but I see the float coming over towards Pier 2.
Q. Did you do anything about getting them back?
A. No, sir. I had a line on to hold her until the wind went down, a line on the float; after it was landed on Pier 2, I put a line on.
Q. You put a line from your pier across the Basin?
A. After she landed, tied her.
Q. She was alongside of some scows?
A. Some scows that drifted in there over night.
Q. She was outside of those scows at Pier 2?
A. Yes, sir.
Q. And you put a line over to your pier across the Basin?
A. Yes, sir, that's right.

Cross-examination by Mr. Brumley:

Q. Just before you saw the Float No. 46 adrift, where were you?
A. I was up at the office.

Q. And somebody told you that the float was adrift?
A. Yes, sir.
Q. And that is the reason you went down to see what had happened?
A. Yes, sir.
Q. So that you did not see the float go adrift?
A. I did not see her go adrift, but I see her on her way, drifting.
Q. Did you see the New York Central tug come in there?
A. I seen the New York Central taking the carfloat out.
Q. That was before they went adrift?
A. No, it was on her way out with her when I come down there.
[fol. 47] Q. She had taken the float out at that time?
A. Yes, sir.
Q. You did not see the New York Central tug come in and take the float out?
A. No, I did not, otherwise, I would have been over there.
Q. Well, you were 1,200 or 1,800 feet away, did you say?
A. About a distance like that, something.
Q. Do you have anything to do with the removal of floats after they have been repaired?
A. Yes, sir.
Q. You were not on the pier when Float No. 46 came in on the morning of February 25, were you?
A. I don't know, she came in in the night-time, I believe, twelve o'clock, and one of my men took lines from her.
Q. Were you there when the No. 46 was removed to the dry-dock?
A. Yes, sir, I done that.
Q. You attended to that?
A. I attended to that, yes, sir.
Q. And did you attend to the removal of No. 46 from the dry-dock?
A. Yes, sir.
Q. To the pier?
A. Yes, sir.
Q. Did some of your men tie Float No. 46 up to the New York Central Float?
A. Yes, sir, I done it myself, I was there directing it.
Q. And when was she tied up by you to the New York Central Float, on March 26th?
A. It was about four at night.
Q. March 26th?
A. I suppose so. The 27th, I think, I ain't sure exactly; it was the day before the accident.
Q. And you did not see Float No 46 after that time, did you?
A. The next morning.
Q. The morning of March 28th?
A. The morning of March 28th.
[fol. 48] Q. Did you move her at any time during March 28th?
A. No, sir.
Q. So that from the time you tied her up on March 27th, to the time she went adrift, she had not been moved?

A. No, sir, she had not been moved.
Q. As a matter of fact on March 28th, she had still repairs to be made to her?
A. Well, I am not positive, I suppose she was doing some work, but whether she was finished or not, I could not tell you.
Q. Do you know what time the Float No. 46 left Crane's Pier?
A. It must have been around twelve or one.
Q. I mean, finally left after repairs had been made?
A. I do not.
Q. That was in April, wasn't it?
A. I believe it was.

[fol. 49] UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

KNOX, D. J.: From all the evidence before me, it seems to me that the last intervening cause of the accident, which occurred to the Mary Ethel, was the fact that the New York Central came in and after removing the New York Central barge, allowed the Number 46 to go adrift, but that fact will not relieve the Director General, operating the New York, New Haven & Hartford Railroad, from liability, inasmuch as he is the same entity that is operating the New York Central.

Libellant may have a decree as against both parties, but against the Director General in the first instance.

November 14, 1922.

—— ——, U. S. D. J.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—January 12, 1923

An interlocutory decree having heretofore been entered in the above entitled action on the 20th day of November, 1922, in favor of libelant and against said respondents, holding James C. Davis, Director General, etc., primarily liable, and the respondent Theodore A. Crane Sons Company secondarily liable for libelant's damages, together with interest and costs, and referring the matter to a Commissioner to ascertain and compute the amount of damages, and the parties hereto having agreed on the amount of damages, as appears by the annexed stipulation, and libellant's costs having been taxed [fol. 51] at the sum of $37.65 it is now on motion of Messrs. Foley & Martin, proctors for the libelant herein,

Ordered, adjudged and decreed that the libelant Timothy Donovan, as owner of the deck scow "Mary Ethel" recover of and from James C. Davis, Director General and as Agent, etc., primarily, and Theodore A. Crane's Sons Company secondarily, the sum of Five hundred seventeen and 62/100 Dollars, together with costs taxed at the sum of $37.65 and amounting in all to the sum of Five hundred fifty-five and 27/100 ($555.27) Dollars, which latter sum shall bear interest until paid, and that said libelant have judgment therefor, and it is further

Ordered that unless an appeal be taken in accordance with the rules and practice of this court within ten days after the service of a copy of this decree with notice of entry thereon on the proctors for respondents, let the stipulators on behalf of said respondents cause the engagement of their respective stipulations to be performed, or show cause within four days after said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, lands and chattels.

Jno. C. Knox, U. S. D. J.

[fol. 52] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION

It is hereby stipulated and agreed that the libelant's damages are as follows:

Repairs	$301.21
Demurrage	90.75
Surveyor's fee	15.00
Towing to dry dock	30.00
Lost equipment	23.70

with interest on the foregoing from July 9, 1919, to January —, 1923.

And it is further understood and agreed that this stipulation is entered into without prejudice to the rights of any of the parties hereto on appeal.

Dated New York, December 21, 1922.

Foley & Martin, Proctors for Libelant. Charles M. Sheafe, Jr., Proctor for James C. Davis, Director-General of Railroads and as Agent (N. Y., N. H. & H. R. R.). Carter, Carter & Phillips, Proctors for Theo. Crane Sons Company.

[fol. 53] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that the respondent, Director General of Railroads of the United States (New York, New Haven and Hartford Railroad) hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, at the next term thereof, to be held at the court room, in the United States District Court, Post Office Building, Borough of Manhattan, City of New York, in said Circuit, from the final decree entered herein, on the 12th day of January, [fol. 54] 1923, and from each and every part of said decree as well as from the whole thereof.

Dated, New York City, N. Y., January 30th, 1923.

Charles M. Sheafe, Jr., Proctor for Respondent. Office and P. O. Address, Room 3610, Grand Central Terminal, New York City.

To Foley & Martin, Esqs., Proctors for Libellant, 64 Wall Street, New York City.

To Alexander Gilchrist, Clerk, United States District Court, Southern District, Post Office Building, Borough of Manhattan, City of New York.

To Carter, Carter & Phillips, Esqs., Proctors for Theodore A. Crane's Sons Co., 15 Whitehall Street, New York City.

[fol. 55] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

James C. Davis, Director General of Railroads of the United States (New York, New Haven and Hartford Railroad), assigns error in the proceedings and opinion of the District Court herein, as follows:

First. In that in the final decree entered January 12th, 1923, it was ordered, adjudged, and decreed that the libellant recover of and from James C. Davis, Director General and as agent, etc., primarily, and Theodore A. Crane's Sons Company, secondarily, the sum of Five Hundred Sixteen and 62/100ths ($516.62) Dollars together with costs taxed at the sum of Thirty-seven and 65/100ths ($37.65) Dollars, amounting in all to the sum of Five Hundred Fifty-five and 27/100ths ($555.27) Dollars.

Second. In that said final decree provided that the libellant recover of and from James C. Davis, Director General and as agent, etc.

[fol. 56] Third. In that the court ordered, adjudged and decreed that the libellant recover from James C. Davis, Director General and as agent, etc., primarily, and Theodore A. Crane's Sons Company, secondarily.

Fourth. In that the court found that the last intervening cause of the accident which occurred to the "Mary Ethel" was the fact that the New York Central came in and after removing the New York Central barge allowed the No. 46 to go adrift.

Fifth. In that the court found that the Director General operating the New York, New Haven and Hartford Railroad was the same entity as that operating the New York Central tug.

Sixth. In that the court found that the Director General operating the New York, New Haven and Hartford Carfloat No. 46 was the same entity as that operating the New York Central tug at Crane's dry dock, and, therefore, in effect held that the court had before it the Director General operating any and all systems of rail roads anywhere in the United States.

Seventh. In that the court ruled in effect that the alleged damage was due to the negligence of the servants of the Director General of Railroads, and, therefore, it was immaterial in so far as the liability of the Director General was concerned whether these servants were employed in the operation of the New York Central Railroad Company or The New York, New Haven and Hartford Railroad Company.

[fol. 57] Eighth. In that the court exceeded its jurisdiction when it held that in this action the Director General of Railroads was in court for all purposes notwithstanding that the libel herein was filed against the Director General of Railroads operating the New York, New Haven and Hartford Railroad, and that in such suit the Director General of Railroads could be made to respond for faults of his servants, agents and employees, employed to operate an entirely separate and distinct system of transportation belonging to another carrier, to wit, the New York Central Railroad, and in that such a holding is both contrary to the terms of the Act of March 21st, 1918, known as the Federal Control Act, and the Act of February 28th, 1920, known as the Transportation Act.

Ninth. In that the court did not find that no process was served on any officer or agent of the New York Central Railroad Company, as required by Sub-section B, Section 206 of the Act of February 28th, 1920, known as the Transportation Act.

Tenth. In that the court did not find that the President took over the physical properties the transportation systems, as entities, and that they were always dealt with as such.

Eleventh. In that the court did not find that Theodore A. Crane's Sons Company was primarily responsible because it did not have a person on board in charge of New Haven Carfloat No. 46 to keep her from damaging other vessels.

[fol. 58] Twelfth. In that the court found that the New York Central barge at Theodore A. Crane's Sons dry dock was removed by a New York Central tug.

Thirteenth. In that the court found that the New York, New Haven and Hartford Railroad Carfloat No. 46 was being operated by the Director General of Railroads.

Fourteenth. In that the court did not find that the damage was caused solely by the working float stages or scows of Theodore A. Crane's Sons Company.

Fifteenth. In that the court did not find that the damage was caused solely through the fault of an unknown person shifting the New York Central float.

Sixteenth. In that the court found that the New York, New Haven and Hartford Railroad Float No. 46 caused the damage.

Seventeenth. In that the court did not find that the libellant should not recover of and from the Director General of Railroads of the United States (New York, New Haven and Hartford Railroad).

Eighteenth. In that the court did not find that the damage was caused by the fault of the respondent, Theodore A. Crane's Sons Company.

Nineteenth. In that the court did not find that the New York, New Haven and Hartford Railroad Float No. 46 was delivered to [fol. 59] the respondent Theodore A. Crane's Sons Company, on March 25th, 1919; that she went on the dry dock on March 26th; came off the dry dock on the 27th; was undergoing repairs by the respondent Theodore A. Crane's Sons between March 21st and April 4th, 1919; that the respondent, Director General of Railroads (New York, New Haven and Hartford Railroad) did not take possession of said Float No. 46 until April 6th, 1919; that at the time of the alleged accident to the said "Mary Ethel," the said Float No. 46 was in the exclusive possession, care and custody of said respondent, Theodore A. Crane's Sons, and that the respondent, Director General of Railroads (New York, New Haven and Hartford Railroad) was, therefore, in no way responsible for said alleged damage.

Charles M. Sheafe, Jr., Proctor for Director General of Railroads of the United States, (New York, New Haven & Hartford Railroad). Office & P. O. Address, Room 3610, Grand Central Terminal, Borough of Manhattan, New York City.

[fol. 60] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION IN RE EXHIBITS

It is hereby stipulated and agreed by and between the Proctors for the respective parties hereto that Exhibit 1, being a diagram, need not be printed herein, but may be transmitted to the Circuit Court of Appeals for the Second Circuit in its original form and that the same may be used by any of the parties on the argument of the appeal with the same force and effect as though said exhibit was included in the foregoing transcript of record.

New York, April 30, 1923.

Foley & Martin, Proctors for Libellant-Appellee. Charles M. Sheafe, Jr., Proctor for Respondent-Appellant. Carter, Carter & Phillips, Proctors for Respondent-Appellee.

[fol. 61] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, May 20, 1923.

Foley & Martin, Proctors for Libellant-Appellee. Charles M. Sheafe, Jr., Proctor for Respondent-Appellant. Carter, Carter & Phillips, Proctors for Respondent-Appellee.

[fol. 62] UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 4th day of June, in the year of our Lord one thousand nine hundred and twenty three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 63] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Argued October 18, 1923. Decided November 5, 1923

OPINION

Appeal from a final decree of the District Court for the Southern District of New York in favor of libellant against Davis, as Director General of Railroads, primarily and Theodore A. Crane's Sons Co. secondarily for $555.27 damages.

[fol. 64] Mayer, Circuit Judge: The action was to recover for damage to the scow "Mary Ethel" owned by libellant, caused by collision on March 28, 1919, at Pier 2, Erie Basin.

The facts are very simple and were rightly decided below. It is unnecessary to recite the details.

For the purpose of this opinion, it is enough to state that the "Mary Ethel" was moored at Pier 2, Erie Basin. She was damaged by contact with the New York, New Haven & Hartford Railroad Co. carfloat No. 46, which was negligently cast loose by a New York Central tug in removing a New York Central barge or carfloat to which the No. 46 had been made fast.

We think that the New York Central R. R. Co. tug was sufficiently identified and, in view of the date of the occurrence, i. e., March 28, 1919, we are of opinion that the District Court was justified in finding that the New York Central tug was being operated by the Director General.

1. The contention of appellant is, that "Even though it be admitted that the New York Central tug was under the control and operation of the Director General of Railroads operating the New York Central Railroad, the Director General of Railroads operating the New Haven Railroad, being a separate and distinct person is in no way responsible."

Appellant seeks to avoid the decision of this court in Globe & Rutgers Fire Ins. Co. v. Hines, Agent, 273 F. R., 774, by the effect [fol. 65] as he contends, of Missouri Pacific Railroad Co. v. Ault, 256 U. S., 554.

In that case, a statute of Arkansas provided a certain penalty for the non-payment of the wages of a discharged employee. The opinion dealt with two main questions. In respect of one of these questions, the Supreme Court held, in effect, that Congress had not given its consent that suits of this character be brought against the United States. The other part of the opinion dealt with causes of action which arose prior to government control and also with those which arose during government control. In our view, the opinion of the Supreme Court fully sustains the Globe and Rutgers Fire Ins. Co. case, supra.

The Court said, per Mr. Justice Brandeis:

"If the cause of action arose while the Government was operating the system the 'carrier while under Federal control' was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operating could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See Gracie v. Palmer, 8 Wheat, 605, 632-633. The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of explicit direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the Government liable. It doubtless seemed, as suggested in McNulta v. Lochbridge, 141 U. S., 327, 331-332, that suit should be brought against the transportation company by name 'in the hands of,' or 'in the possession of,' a receiver, or Director General. All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name.

[fol. 66] As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their system of transportation by the Government, the provision in Order No. 50, authorizing the substitution of the Director General as defendant in suit then pending was within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted; and the judgment against it should, therefore, be reversed."

We are not here concerned with what question, if any may arise as between the railroads and the Government. The sole point is that the outside litigant, such as this libellant, need look only to the Director General as the party to respond for damage caused by negligence on the part of any of the railroads which he was operating, pursuant to the Federal Control Statutes.

2. We are unable to see upon what theory Theodore A. Crane's Sons Co. was held secondarily liable. Carfloat No. 46 was in the custody of the Crane concern for repair purposes. There is no evidence which shows that the carfloat was not properly positioned or made fast or that this respondent, in any manner, was guilty of any negligence. Upon this record, there is no evidence that this respondent

had any control whatever over the operation of the New York Central tug.

This respondent did not appeal, but as this is a new trial we may, under now thoroughly settled authority, make such disposition as we deem proper whether or not one of the litigants has appealed.

The decree must be modified by striking out so much thereof as adjudges Theodore A. Crane's Sons Co. secondarily liable.

Decree modified as indicated with costs in favor of libellant-appellee against respondent-appellant and without costs to respondent-appellee.

[fol. 67] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed November 12, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court with costs in favor of libellant against the appellant and without costs to respondent-appellee.

H. W. R.
M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[File endorsement omitted.]

[fol. 68] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 68 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Timothy Donovan, Libellant-Appellee, against Director General of Railroads, Respondent-Appellant, Theodore Crane's Sons

Company, Respondent-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of January in the year of our Lord One Thousand Nine Hundred and twenty-four and of the Independence of the said United States the One Hundred and forty eighth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

[fol. 69] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING WRIT OF CERTIORARI—February 18, 1924

On petition for writ of Certiorari to The United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

It is further ordered that this cause be, and the same is hereby, placed on the summary docket, and assigned for argument on Monday, April 7th next, after the cases heretofore assigned for that day.